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In the Supreme Court of the United States

October Term, 1943

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC CONFERENCE, MOTOR CARRIER CONFERENCE AND CENTRAL PASSENGER MOTOR TARIFF BUREAU, INC., APPELLANTS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

In the District Court of the United States for the Southern District of New York

CIVIL No. 19–390

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION ET AL., PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the district court be affirmed.

This is a direct appeal from the final decree, dated March 17, 1943, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 47), dismissing appellants' petition to set aside an order of the Interstate Commerce Commission. The Commission's order, dated November 17, 1941, was made pursuant to a decision of Division 3 (31 M. C. C. 193) which was affirmed by a decision of the full Commission (34 M. C. C. 641). It required the cancellation, as

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Since 20,000 pounds represents the largest amount of this type of commodity which can be loaded into the average truck, this proposal (in the first two parts of the schedule) presented a situation where a carrier offered a lower rate to the shipper of an amount in excess of one truckload (*i. e.*, the 30,000-pound rate) than to the shipper of a truckload amount. Upon protest of western trunk-line rail carriers, the Commission embarked upon investigation and suspension proceedings.

Appellant association sought to justify the lower rate on amounts in excess of truckload on the ground that it was necessary to meet the competition of rail rates based upon a 30,000-pound weight minimum. With respect to the railroads, however, this minimum weight represented the carload amount. It was found that the motor carriers would not have relatively lower operating costs when handling amounts in excess of truckload than when handling truckload amounts. Appellants have never denied that. Division 3 of the Commission concluded that the proposed schedules were unreasonable to the extent that they proposed to establish a minimum of 30,000 pounds. After oral argument before it, the full Commission not only reaffirmed the conclusion of Division 3 that the 30,000-pound minimum was unreasonable, but also concluded that the proposed rates, minimum 30,000 pounds, were illegal, under Section 216 (d) of Part II of the Interstate Com-

merce Act (49 U. S. C. 316 (d)), in that they were unjustly discriminatory to shippers of 20,000-pound lots. It based its conclusion on the absence of showing of operating savings under the 30,000-pound rate, and found the railroad competition no justification.

Appellants raise three principal contentions: That the Commission as a matter of law was required to consider the existence of rail competition as a justification; that the Commission could not properly base its conclusion that there was unjust discrimination on the factor of absence of economy in operating costs under the 30,000-pound rate; and that discrimination could not be found without a finding that some particular shipper was unable to furnish a large enough amount to avail himself of the 30,000-pound rate whereas other shippers could. It is submitted that these contentions present no substantial question and that the decree of the district court should therefore be affirmed without argument.

Appellants' contention that differences in competitive conditions are, as a matter of law, a defense in a discrimination case is effectively answered by the recent decision of this Court in *L. T. Barringer and Co.* v. *United States*, No. 520, this Term. It was there held that what is an unjust discrimination under Section 2* of the

* The Commission has always treated decisions involving discrimination and preference under the railroad provisions of the Interstate Commerce Act as equally applicable under

Interstate Commerce Act (49 U. S. C. 2) is a question of fact for the Commission and (pamphlet p. 5) "that it is for the Commission, not the courts, to say whether * * * differences [in competitive conditions] are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful." Even before the *Barringer* decision, it was firmly established by numerous rate cases involving undue preference or reasonableness, rather than discrimination in the technical sense, that differences in competitive conditions were not an absolute defense, but merely factors to be considered by the Commission. *E. g., Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166; *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515. In fact, prior to the *Barringer* decision it had been regarded virtually as a rule of law that competitive differences could not be considered as a justification for discrimination in the technical sense. *Wight* v. *United States*, 167 U. S. 512, 516–518; *Interstate Commerce Commission* v. *Alabama Midland Ry.*,

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the comparable provisions dealing with motor carriers and contained in Section 216 (d) of the Act (49 U. S. C. 316 (d)). *Arrangements-Arrow Carrier Corp. and Duplan Silk Corp.*, 4 M. C. C. 657, 677. This Court has apparently adopted the same view. *United States* v. *Chicago Heights Trucking Association*, 310 U. S. 344.

supra, 166; *Seaboard Air Line Ry.* v. *United States,* 254 U. S. 57, 62.[5] While the *Barringer* decision now gives the Commission the right to consider, on a factual basis, competitive conditions even in a discrimination case, it leaves the weight to be given that factor in a particular case entirely to the Commission. The factor of competition was given consideration[6] in the present case, yet found not controlling, and appellants accordingly have no legitimate complaint.

Appellants' argument that the Commission could not properly base its conclusion upon the absence of economy of operation under the 30,000-pound rate is equally without substance. Early in its history, the Commission adopted the view that the only discrimination which could

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[5] In both the *Wight* and *Seaboard* cases, in which competitive conditions were not considered a justification, the preferred shipper and the shipper discriminated against shipped over the same route. The same is true here. In the *Barringer* case, the justification for the differentiation based upon competitive conditions arose from the fact that the two shippers employed different routes.

[6] The Commission in its second report said in this connection (34 M. C. C. 641, 648):

"* * * The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided on the facts in each case. * * *

"The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices. The competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination."

legally be made between a large shipment and a small one must be based upon the difference in cost of service. *California Commercial Association* v. *Wells, Fargo & Co.*, 14 I. C. C. 422, 431. While in view of the *Barringer* decision difference in cost of service cannot now be considered the only possible justification for what might otherwise be an unjust discrimination,[7] the presence or absence of that factor must still be considered the most important criterion. Thus, it has been recognized by this Court that the validity, as nondiscriminatory, of carload rates lower than less-than-carload rates, rests upon the presence of a saving in operating costs under the former. *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 240. And the Commission, even before the present case, in considering whether or not reduced rates on amounts in excess of truckload or in excess of carload were discriminatory, has looked[8] primarily

[7] Commissioner Eastman had recently expressed this view even before the *Barringer* case in his dissent in *Grain Proportionals, Ex-Barge to Official Territory*, 248 I. C. C. 307, 319.

[8] Because there was no showing of saving of costs under certain reduced rates on amounts in excess of truckload, the Commission condemned the rates as discriminatory in *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527, 529, and in *Coal, Wyoming, to Idaho Falls, Lincoln, and Shelley, Idaho*, 29 M. C. C. 335, 340. On the other hand, the Commission upheld lower rates on multiple carload lots in *Molasses From New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 485. That case was construed

to the cost of service factor. Furthermore, this Court has recently sustained the conclusion of the Commission, based principally upon the absence of showing of operating cost saving, that another motor-carrier tariff resulted, like the present one, in unjust discrimination in favor of the large shipper, there a freight forwarder. *United States* v. *Chicago Heights Trucking Association*, 310 U. S. 344, sustaining the Commission's conclusions in *Chicago and Wisconsin Points Proportional Rates*, 10 M. C. C. 556, 569; 17 M. C. C. 573, 578–579.

The remaining contention, that it is necessary for the Commission to find injury to some particular shipper before concluding that there is unjust discrimination, was clearly rejected by this Court in *United States* v. *Chicago Heights Trucking Association, supra*, 353–354. It was there pointed

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by the Commission in its present decision and in the *Petroleum Products* case, *supra*, as having been based upon the existence of a saving in operating costs under these rates rather than upon the existence of competition as was argued by appellant association. The above cases, including the present one, represent, in fact, a more liberal attitude by the Commission than it had previously applied in considering the validity of lower rates on amounts in excess of carload. Prior to these decisions, the Commission had uniformly adopted the view that reduced rates on amounts in excess of carload were necessarily illegal, even when they resulted in operating savings, because of their tendency to discriminate in favor of large shippers and concentrate business in their hands. *Anaconda Copper Mining Co.* v. *C. & E. R. R. Co.*, 19 I. C. C. 592, 596; *American Round Bale Press Co.* v. *A., T. & S. F. Ry. Co.*, 32 I. C. C. 458, 463–464.

out that in a discrimination case the Commission may act in a public capacity in the interests of shippers generally without complaint from individual shippers. In the present case, as a matter of fact, while shippers did not appear at the hearing, a representative of all but two of the linoleum manufacturers in the United States appeared in opposition to the rates (34 M. C. C. 641, 645–646).

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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